Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1998

JOHN A. ROBINSON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

John A. Robinson
P.O. Box 5000
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Pro-Se Defendant

48pp

## QUESTION(S) PRESENTED

1. Whether the Court of Appeals considered the appropriate constitutional standard of materiality governing motions for new trial under Fed. Rule Crim. Proc. 33 based on the prosecution's knowing use of perjured testimony?

2. Whether on the facts the failure of the prosecutor to correct the testimony of the witness (which he knew to be false) denied petitioner due process of law in violation of the Fifth Amendment to the Constitution of the United States?

3. Whether the Fifth and Sixth Amendments to the Constitution of the United States are satisfied where the trial Judge (at the government's behest), not the jury, decides the essential element, where the government's proof of the essential element is not over-whelming and the essential element is the sine qua non to establish a violation of the crime charged?

4. When a trial Judge (at the government's behest), gives jury instructions that makes a factual finding, that is a misrepresentation of law as to a essential element of the crime charged, (1) can the error be held harmless? and (2) if so was the error harmless in this case?

5. Whether the Government has the burden to prove that an error (it) invited is harmless beyond a reasonable doubt, and if so did the Government meet its burden in this case?

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner, John A. Robinson, respectfully prays that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on September 11, 1998.

## OPINION BELOW

The opinion of the Court of Appeals appears at App. A to the petition and is unpublished.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1998. The petition for rehearing was denied on November 3, 1998, and copy of the order denying rehearing appears at App. B. On January 20, 1999, an extension of time to file the petition for a writ of certiorari was granted to and including April 2, 1999 in Application No. A-588. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case requires interpretation and application of the Fifth and Sixth Amendments to the Constitution of the United States. The Fifth Amendment provides, in pertinent part:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . . *see* Appendix-C for full quote

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . . *see* Appendix-C for full quote.

## STATUTES INVOLVED

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined under this title or imprisoned not more than 10 years or both.
>
> **18 U.S.C. § 2312**
>
> "Motor vehicle" includes an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails.
>
> **18 U.S.C. § 2311**

## STATEMENT OF THE CASE

### A. The Basis for Jurisdiction Below.

John A. Robinson was convicted of nine counts of Interstate Transportation of Stolen Vehicles, in violation of 18 U.S.C. § 2312; eight counts of Money Laundering, in violation of 18 U.S.C. § 1956; and one count of Money Laundering, in violation of 18 U.S.C. § 1957 in the United States District Court for the Western District of Kentucky. The basis for Federal jurisdiction in the Court of first instance was under 18 U.S.C. § 3231.

### B. The Facts Material to The Questions Presented.

On October 19, 1994, a Grand Jury sitting in the Western District of Kentucky at Louisville, returned an indictment against Petitioner John Anthony Robinson.

On November 22, 1994, Robinson filed a Discovery Motion requesting, *inter alia*, "any deals, promises or inducements made to [Government] witnesses, in exchange for their testimony." The District Court granted the motion on January 5, 1995. The Government's Response did not disclose that any "deals, promises or inducements" had been made to its witnesses.

On March 9, 1995, the District Court set Robinson's jury trial for 9:30 a.m. on May 15, 1995.

With Robinson's trial date set, the government obtained a superseding indictment on April 19, 1995.

On May 1st, 1995, the government obtained a second superseding indictment. This indictment charged Robinson as follows:

Counts 1-33, Interstate Transportation of Stolen Vehicles, in violation of Title 18 U.S.C. § 2312 and 2; Counts 37-78, Money Laundering, in violation of Title 18 U.S.C. § 1956; Counts 79-82, Section 1957, Money Laundering, in violation of Title 18 U.S.C. § 1957; and, Count 83, Money Laundering Forfeiture, pursuant to Title 18 U.S.C. § 982(a)(1).

On May 15, 1995, Robinson's bifurcated jury trial began.

On May 23, 1995, the government called Edward J. Mitchell to testify. Mitchell's testimony was introduced, pursuant to Fed.R.Evid. 404(b), over Robinson's objections.

Mitchell's testimony provided the foundation upon which the government built its entire theory of their case. He offered the only testimony that directly linked Robinson with knowledge that the backhoes were stolen. Indeed, his testimony was, to say the least, critical to the government.

On February 21st, 1995, Mitchell signed a Plea Agreement with the government. (Mitchell Tr., Vol. 7 at p. 8).[2] The Plea Agreement indicated, *inter alia*, that he was going to plead guilty to certain charges involving the alteration of VIN numbers of 580-K backhoes. (*Id.* at p. 9). That the government agreed that a sentence of 36 months would be appropriate disposition of the case and that if his cooperation is such that when he cooperates and

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[2] (Tr.) refers to trial transcripts. (Th.) refers to post-trial hearing transcripts.

works with government agents, F.B.I. agents *concerning other investigations,* that he may receive an additional downward departure if one is merited. (*Id.* at p. 10).

Prior to signing the Agreement, Mitchell was in jail under State charges for robbing vending machines. (*Id.* at p. 11-12). Mitchell had been in jail almost continuously from 1983 to 1995 for robbing vending machines. *Id.* Mitchell blamed his criminal career on a drug habit he developed in 1979, due to an auto accident. (*Id.* at p. 12). However, since January of 1995, he had stopped using drugs. (*Id.* at p. 27). Mitchell had an occasion to run into Robinson four or five days after Mitchell's May 20th 1994 release from prison. (*Id.* at p. 17). At this time, Mitchell asked Robinson for a job. *Id.* Later in June, Mitchell had an occasion to go with Robinson to a garage in Middletown. *Id.* Once in the garage, Mitchell saw two 580-K backhoes. (*Id.* at p. 18). Mitchell stated to Robinson. "I see you're back in business." *Id.* There were two people grinding numbers off the side of a backhoe. *Id.* All they were doing was grinding them down and restamping them. (*Id.* at p. 20). Based on his experience, Mitchell suggested another type of treatment Robinson could do on the backhoe. The two people were grinding on a L-bracket and he observed other L-brackets in the garage. (*Id.* at p. 21). Based on Mitchell's experience, Robinson requested him to use his technique on a backhoe. *Id.* Mitchell took a torch and cut out the backhoe's L-bracket and took a grinder and smoothed it down and welded another plate there, which Robinson had already made up. *Id.*

After Mitchell signed the Plea Agreement with the government in February, he later refused to cooperate with the United States, and let it be known to AUSA Schwartz and Agent Parris. (*Id.* at p. 25). When Mitchell said that to the United States, the State charges got reinstated. *Id.*

After AUSA Schwartz successfully had the State to reinstate their charges, this time adding a Persistent Felony Offender in the first degree charge (hereinafter PFO-1), Mitchell had a change of heart and decided to testify against Robinson.

Mitchell testified that in November of 1994, he was facing three counts of burglary and two counts of theft by unlawful taking over $300 – all felonies. He was facing a total of 25 years in the penitentiary. (*Id.* at p. 30).

In trying to show the jury that Mitchell had made his backhoe story up against Robinson in return for the government's help with his State charges, defense counsel asked, and he answered as follows:

> *COX:* So you're going to serve a big chunk of 25 years, if not all of it, isn't that fair to say?
>
> *MITCHELL:* Yeah.
>
> *COX:* Now you didn't want to do that, did you?
>
> *MITCHELL:* Nobody would.
>
> *COX:* Sure. But you especially didn't want to because you've been to prison so many times and you can't stand it, isn't that fair to say?
>
> *MITCHELL:* I'm trying to turn my life around.
>
> *COX:* I understand you're trying to get out of trouble.
>
> *MITCHELL:* I'm trying to go and do whatever I have to do as far as paying my debt to society and trying to put my life in order. (*Id.* at p. 31).

On redirect, the government successfully assured the jury that Mitchell was not testifying against Robinson in return for its help with his State charges:

> *AUSA SCHWARTZ:* Now have I told you anything about your state charges – or tell me what I have told you about your state charges?
>
> *MITCHELL:* You ain't told me nothing.
>
> *AUSA SCHWARTZ:* Huh?

*MITCHELL:* You ain't told me nothing about the state charges.

*AUSA SCHWARTZ:* You're charged, and that's your problem?

*MITCHELL:* Yes, it is. (*Id.* at p. 62). (Emphasis added).

*AUSA SCHWARTZ:* And you're still going to face the state charges on your own?

*MITCHELL:* Yes, I am. (*Id.* at p. 63) (Emphasis added).

At the close of Robinson's trial, the District Judge instructed the jury at the government's behest, in pertinent part as follows:

> The term "motor vehicle" includes any self-propelled vehicle designed for running on land *but not on rails. A backhoe (is) a motor vehicle as that term is used in these instructions.* (R. 148: Instructions at p. 8).
>
> . . . but only to prove the defendant's state of mind; that is, that the defendant acted as charged in this case with knowledge that *"the backhoes"* were stolen and not through accident or mistake. (*Id.* at p. 15).
>
> . . . a high probability that *"the backhoes"* were stolen . . . (*Id.* at p. 17).
>
> But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that *"the backhoes"* were stolen . . . [3] (*Id.*).

Robinson did not object to the Court's constitutionally defective instructions; nevertheless, he did not stipulate or concede to them. After three days of deliberations, the jury returned its verdict, finding Robinson guilty as to Counts 25-33, Interstate Transportation of

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[3] The District Court gave the jury a printed copy of these defective instructions to refer to during their deliberations.

Stolen Vehicles and Counts 71-78 & 82, Money Laundering and not guilty as to Counts 1-24 Interstate Transportation of Stolen Vehicles and Counts 37-70, 78-81, Money Laundering.

On November 20, 1995, the District sentenced Robinson to, *inter alia*, 162 months of imprisonment. Robinson filed a timely Notice of Appeal to the Sixth Circuit Court of Appeals.

While Robinson's appeal was pending, he begin discovering evidence that the government knowingly used perjured testimony to obtain his conviction.

The first discovery was the September 25, 1995 Federal Sentencing transcript of Government witness, Edward J. Mitchell. The transcript revealed the following:

> *AUSA SCHWARTZ:* This is a really tragic case in my estimation because this gentleman for *six months* lived a very exemplary life and *was doing everything that he agreed to do,*[4] and then unfortunately had a relapse back into the drug usage and has been in essence a fugitive for the last 60 days plus, and thus much of the good things that he had done have gone for naught. In other words, he is not really at this point able to assist the United States in any further cases which he was starting to work on. So I feel compelled to tell the court that.
>
> I mean, I have much empathy for this young man and was very pleased to see how well he was doing while under the court's supervision and under drug testing. He had cleaned up his life and was working, doing everything we would hope he would do to straighten his life out. I was prepared to move for the downward departure had again, he not had to go back and revert to drugs.

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[4] This would include the time at which Mitchell testified against Robinson.

Further, there's information that he was in the Nashville, Tennessee area during this period when he was a fugitive, and his criminal past is such that he breaks into vending machines. And a car with the license plate belonging to him was seen at a scene of a break-in of the vending machines in that area. So that would of course follow his drug problems because he would have had to support his drug habit, again going back to what was his expertise in breaking into vending machines.

Basically, your Honor, to summarize, I think that I must live up to the plea agreement that I have made, that being that he should be sentenced to a term of 36 months. I regret –

*THE COURT:* How many months?

*AUSA SCHWARTZ:* 36, Your Honor. I'll give you a little background in terms of what the 36 months meant.

He was being charged in state court for breaking into vending machines and was eligible and **is being charged with PFO-1,** which **would have** gotten him **if** he were convicted a sentence somewhere in the vicinity of eight to ten years to serve. So I tried to help him out in the initial plea agreement of the 36 months to give him the break then to produce him in federal court rather than state court, and the state court did dismiss those charges, **or at least agree for him to serve his time in federal custody.**[5]

Again, that is the background, Your Honor, and the basis of why I'm asking the court to follow the plea agreement and sentence of 36 months. (Mitchell Sentencing, Tr. at pp. 3 & 4).

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[5] Mitchell was being sentenced in federal court for allegedly altering VIN numbers on 580-K backhoes for Robinson. Not once did AUSA Schwartz make reference to the Federal charges as the reason for his 36 month Federal sentence.

Further discovery affirmed the fact that the government had an understanding with Mitchell, that they would help him with his State charges.

On May 3, 1996, Mitchell went before the Jefferson County Circuit Court Judge, Geoffrey Morris. This was due to the second indictment the government successfully had the State bring against Mitchell when he refused to testify against Robinson. Those in attendance were Judge Morris; David Stengel, Attorney for Mitchell; Mitchell; Assistant Commonwealth's Attorney – Mckay Chauvin; Det. Perry with the Jefferson County Police; AUSA Mazzeli and AUSA Schwartz. Contrary to what Mitchell told the jury at Robinson's trial, AUSA Schwartz made the following statement on behalf of Mitchell:

> "It was the understanding between the FBI and the Commonwealth that Mr. Mitchell would not be prosecuted and that was relayed to him so we are objecting from the standpoint of what the understanding was with Mr. Mitchell and the United States to this. I understand in the best interest of Mr. Mitchell he is going ahead with this plea and we have indicated to him we will contact the Bureau of Prisons on his behalf and as this conviction affects it."

Based on AUSA Schwartz' statements, the State Judge sentenced Mitchell to three (3) years concurrently with his Federal sentence. At the government's request, this sentence was later reduced to two (2) years concurrently with his Federal sentence so he would not serve any more time in custody due to the State sentence.

After further investigation on November 12, 1996, Robinson filed a motion requesting a new trial pursuant to Fed.R.Crim.P. 33, based on the government's knowing use of perjured testimony. An Evidentiary Hearing was held on May 23, 1995 before the Honorable Judge Charles Simpson. The Evidentiary Hearing revealed further post-trial evidence that supported Robinson's trial theory that Mitchell testified against him to curry favor with the

government. Further, it was revealed that the government knew, or should have known, that Mitchell had fabricated his testimony about Robinson. This evidence appeared, in pertinent part as follows:

1. The Government knew the County Police had initiated some surveillance on Mitchell and had a real strong case against him on burglary charges of vending machines. (Parris Th., at p. 41).

2. The Government knew that Mitchell had immediately come forward with his story about Robinson only after his arrest by the County Police, and he was facing a lengthy prison sentence for robbing vending machines. (Parris Th., at p. 11, 12).

3. The Government knew that Mitchell's goal was to trade his story about Robinson, in return for their help with his State charges. (Parris Th., at 18, 41-42). This is contrary to Mitchell's trial testimony, that he was testifying against Robinson because he was, "trying to turn his life around . . . doing whatever he had to do as far as paying his debt to society and trying to put his life in order." (Mitchell Tr., Vol. 7 at p. 31).

4. The Government knew that Mitchell had a lengthy criminal history for robbing vending machines, but had never been arrested, charged, tried, or convicted of a crime even remotely similar to altering VIN numbers on anything.

5. The government knew they had no corroboration through witnesses or evidence to support Mitchell's testimony against Robinson, except Mitchell himself. (Parris Th., at p. 12, 13, 44; Schwartz Th., at p. 155).

6. The government knew from the beginning that Mitchell was "wise to the system." (Chauvin Th., at pp. 171-172).

7. The Government knew, they had told Mitchell's State Defense Attorney, R. David Stengel,[6] before Robinson's trial, that they had the ability to influence or control the State charges against Mitchell. (Stengel Th., at p. 195). This is contrary to Mitchell's trial testimony at the government's behest, that the government had ***not*** told him anything about his State charges. (Mitchell Tr., Vol. 7 at p. 62).

8. The Government refused to put any agreements in writing when requested to do so by Mitchell's defense attorney. (Stengel Th. at 185).

9. The Government knew that Mitchell had refused to testify against Robinson in return for a five-year sentence, but only agreed to do so in return for a three-year sentence. (Parris Th., at p. 45).

10. The Government knew the State's only concern was that Mitchell was sent to prison. (Parris Th., at p. 44).

11. The Government knew that they told Mitchell's second State defense attorney, that two to three years that would run concurrently with the Federal time would be something worthwhile to pursue. (Schwartz Th., at p. 148).

12. The Government knew that they had been ordered to turn over Discovery, but had failed to do so. (Parris Th., at pp. 31, 32; Schwartz Th., at p. 151).

13. The government knew that they didn't even have enough evidence to convict Mitchell if he went to trial on the Federal charges. (Schwartz Th., at p. 156).

14. The Government knew that after they successfully had the State dismiss its first indictment against

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[6] By the time of Robinson's post-trial hearing, Stengel had been elected as the Commonwealth's attorney for Jefferson County. (Stengel Th., at 188).

Mitchell, he refused to testify against Robinson.[7] (Parris Th., at p. 22).

15. The Government knew that Mitchell's first State indictment did not contain the harsh PFO-1 charge.

16. The Government knew that Mitchell only agreed to testify against Robinson after they coerced him to do so by successfully having the State reindict him adding the harsh PFO-1 charge.

17. The Government knew that even through their plea agreement called for Mitchell to submit to a polygraph examination, they had failed to give him one. (Parris Th., at p. 12; Schwartz Th., at p. 155).

18. The Government knew that the night before Mitchell testified against Robinson they told him that there was *no guarantee* that they could make, say, or do to get the State to drop these second charges . . . Mitchell then told the government he *wouldn't* testify. (Parris Th., at pp. 28-60). This is contrary to Mitchell's trial testimony that the government had not told him anything about his State charges. (Mitchell Tr., Vol. 7 at p. 62).

19. After Robinson's conviction, Agent Parris contacted Sgt. Dumeyer and Det. Perry with the Jefferson County Police Department and told them that Mitchell ultimately testified. Mitchell ultimately fulfilled what he was going to do. (Parris Th., at p. 24).

20. After Robinson's conviction, AUSA Schwartz contacted Stengel and told him various things, but basically that the State charges were to have been dismissed; Mitchell had testified and the State charges were to be dismissed. (Stengel Th., pp. 118, 189).

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[7] Robinson has recently discovered that there is a material difference to the truth of this story. Mitchell did not refuse to testify against Robinson. The truth about the matter is Mitchell refused to plead guilty to the two-count Federal indictment. The reason he refused to do so was that he was dissatisfied with his attorney's advice to do so.

21. Stengel filed a motion to dismiss the State's *second* indictment based upon a *Workman's Agreement*, since it was relayed to him that there was an agreement to dismiss the State's second indictment as a result of Mitchell's testimony against Robinson in Federal court. (Stengel Th., at p. 188).

At the close of the evidence, the District Judge asked AUSA Schwartz to take the witness stand again. The District Judge started by rightfully doubting AUSA Schwartz' testimony.

> *THE COURT:* You told me that you didn't know why you were going there, and I find that awfully hard to swallow. (Colloquy, Th. at p. 198).

AUSA Schwartz told the District Judge that his objecting on behalf of Mitchell in State Court was, "an amazingly bad choice of words." (*Id.*, Th. at p. 205).

The District Court concluded the Hearing by denying Robinson's Motion based on AUSA Schwartz' testimony.

## REASON FOR GRANTING THE WRIT

The Court of Appeals' holding in this matter conflicts with prior relevant decisions of the United States Supreme Court and with holdings of other Federal Circuits, and departs so far from the accepted and usual courts of judicial proceedings as to deny Mr. Robinson the opportunity to a fundamentally fair appeal.

**A. Certiorari Should Be Granted To Bring Uniformity Within The Circuits When Deciding Materiality Of False Testimony, Where The Prosecution Knowingly Uses The Falsehood To Obtain A Conviction.**

**B. Certiorari Should Be Granted To Assure The Public That A Citizen's Constitutional Rights To A Fair Trial Can Never Be Sacrificed For Mere Convenience Of Over-zealous Prosecutors.**

The District Court and the Circuit Court ignored the evidence on this issue, based on AUSA Schwartz' testimony. However, as will be shown, the overwhelming

evidence in the record differs from AUSA Schwartz' testimony and supports the fact that the Government knew, or should have know, that its witness was testifying falsely.

As stated herein in November of 1994, the government witness, Edward J. Mitchell, and his ex-wife were arrested by the Jefferson County Police for robbing vending machines.

On January 17, 1995, the Jefferson County Assistant Commonwealth's Attorney, McKay Cauvin, filed a Motion to Dismiss its charges against Mitchell. The Commonwealth's Motion stated in pertinent part as follows:

> 2. Mr. Mitchell is currently subject to Federal charges pursuant to United States Complaint 94-00358-M-G in the Western District of Kentucky.
>
> 3. While the Attorney for the commonwealth has been in contact with the Attorney for the United States there is not nor has there been any agreement among the parties concerning the disposition of the various charges . . .

On April 12, 1995, at the government's request, the Commonwealth reindicted Mitchell. The Commonwealth's second indictment included a new charge of PFO-1.

On May 23, 1995, Mitchell testified against Robinson. At the government's behest, Mitchell told the jury, *inter alia*, that he was facing the then pending second State indictment on his own. (Mitchell Tr., Vol. 7 at p. 62). Mitchell told the jury that he was testifying against Robinson because he was, "trying to turn his life around . . . doing whatever he had to do as far as paying his debt to society and trying to put his life in order." (*Id.* at p. 31).

At Mitchell's sentencing on September 25, 1995, in Federal Court which was after Robinson's trial, AUSA

Schwartz stated to the Honorable Judge Johnstone in pertinent parts as follows:[8]

> *AUSA SCHWARTZ:* 36, Your Honor. I'll give you a little background of what the 36 months meant.
>
> He was being charged in state court for breaking into vending machines and was eligible and **is being charged with PFO-1,** which **would have** gotten him **if** he was convicted a sentence somewhere in the vicinity of eight to ten years to serve. So I tried to help him out in the initial plea agreement of the 36 months to give him the break then to produce him in federal court rather than state court, and the state did dismiss those charges, **or at least agreed for him to serve his time in federal custody.**

On May 3, 1996, Mitchell went before the State Court. This was due to his pending second State indictment as of April 12, 1995.

In attendance were both Assistant United States Attorneys, Schwartz and Mazzoll.

AUSA Schwartz made the following statements to Judge Morris on behalf of Mitchell:

> "It was the understanding between the FBI and the Commonwealth that Mr. Mitchell would not be prosecuted and that was relayed to him so we are objecting from the standpoint of what the understanding was with Mr. Mitchell and the United States to this . . . ".

At this post-trial hearing, AUSA Schwartz explained to the District Judge, that his statements in State Court to Judge Morris were, "very very poor choice of what he said because it doesn't make particularly good sense . . . "

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[8] Mitchell's case was pending in the Honorable Judge Johnstone's Court. Robinson's case was pending in the Honorable Judge Simpson's Court.

(Schwartz Th., at p. 203). AUSA Schwartz then claimed, and the District Judge accepted, that his statements referred to the dismissal of the charges against Mr. Mitchell in State Court on the first indictment. (*Id.* at. p. 199).

The record clearly differs from AUSA Schwartz' claims.

1. At Mitchell's sentencing in Federal Court, Schwartz stated, ". . . . or at least agreed for him to serve his time in federal custody." It is not coincidental that at the conclusion of Mitchell's sentencing in State Court, he received a two-year sentence running concurrently with his Federal sentence. Further, when Schwartz stated to Judge Johnstone the reasons why he wanted Mitchell to be sentenced to 36 months in Federal custody, he made no reference to the Federal charges – only the State charges.

2. The statements AUSA Schwartz made in State Court were at a Hearing involving Mitchell's then pending second State indictment. At no time did Schwartz state that his statements were in reference to the State's first indictment.

3. How could AUSA Schwartz' statements at Mitchell's second State indictment be in reference to the State's first indictment when the State's *first* indictment was dismissed in January of 1995, the State's Motion to Dismiss this indictment stated, there was not an agreement between the Commonwealth and the United States concerning the disposition of the various charges?

The Court of Appeals held:

> "The district court's finding that the witness did not testify falsely is not clearly erroneous. Moreover, even if the witness did testify falsely, the falsehood was not material. The jury was aware that the witness stood to gain by testifying against defendant. It is unlikely that the jury would have found the witness to be any less credible because he stood to benefit with respect

> to both federal and state charges, rather than just the federal charges."

*See United States v. Robinson*, Slip op. at p. 9 (App. A)

What has been overlooked is that Mitchell clearly testified that he was going to face the State's second indictment on his own. However, it is difficult to imagine more convincing evidence that an understanding had been reached between the government and Mitchell prior to Robinson's trial, than the statement AUSA Schwartz made on his behalf at his sentencing in Federal Court on September 25, 1995. These statements are constant because AUSA Schwartz made the same type of statements on Mitchell's behalf in State Court on May 3rd, 1996.

The critical error is that the Government deliberately misled the jury by assuring it that Mitchell had nothing to gain by giving his testimony against Robinson.

The fundamental unfairness of a conviction obtained through the use of false evidence has long been recognized by this Court. *See, e.g., Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed.2d 791 (1935); *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); *Napue v. Illinois*, 360 U.S. 264, 78 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). As *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), noted, this conduct not only violates constitutionally mandated disclosure obligations, but "involve[s] prosecutorial misconduct" and a "corruption of the truth seeking function of the trial process." 427 U.S. at 104, 96 S.Ct. at 2397. In *Napue, supra*, at p. 1220, 360 U.S. 267, the Assistant State's Attorney that had handled the case testified, [as the government claimed in the instant case], that in his coram nobis petition on Hamer's [the witness] behalf he "probably used some language that [he] should not have used [in his] zeal to do something for Hamer to whom he felt a moral obligation." The lower court denied petitioner relief on the basis of the attorney's testimony. *Id.*

On certiorari, this Court held, that due process had been denied where the prosecution knowingly and without correction elicited false testimony that no promise of lenience had been given in exchange for the testimony of a prosecution witness. At the same time, *Napue* pointedly referred to "[t]he principle that a state may not knowingly use false evidence, including false testimony to obtain a tainted conviction . . . " 360 U.S. at 269, 78 S.Ct. at 1177.

**MATERIALITY**

As stated herein, the Court of Appeals held:

> "Moreover, even if the witness did testify falsely, the falsehood was not material. The jury was aware that the witness stood to gain by testifying against defendant. It is unlikely that the jury would have found the witness to be any less credible because he stood to benefit with respect to both federal and state charges rather than just the federal charges." *See United States v. Robinson,* Slip op. at p. 9 (Exhibit A).

The last testimony of Mitchell's heard by the Jury:

> *COX:* And no matter how many times Mr. Schwartz says you're going to have to serve 36 months in prison, he's put right in your plea agreement that he may very well ask the court to reduce your sentence?
>
> *MITCHELL:* That depends on what I do for Mr. Steve Parris here.
>
> *COX:* I see, plus what you do right here today, isn't that right?
>
> *MITCHELL:* No, I done got my three years. Okay. I might be able to get it lower if I help Mr. Parris out of *some other things.* (Mitchell Tr., Vol. 7 at p. 65) (Emphasis added.)

Clearly, the jury was not aware that the witness stood to gain by testifying against defendant.

The Sixth Circuit's holdings are in great conflict with this Court and other Federal Circuits about this important issue.

Compare, *e.g., Napue v. Illinois*, 360 U.S. 264, 270, 3 L.Ed.2d 1217, 1221, 79 S.Ct. 1173 (1959), which held:

> "We do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one."

*United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 85 L.Ed.2d 481 (1985), this Court held that favorable evidence is material and constitutional error results from its suppression by the Government.

> "If there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Other Circuits adhere to this line of analysis. *See United States v. O'Connor*, 64 F.3d 355, 359 (8th Cir. 1995), "Nevertheless, the fact that other impeachment evidence was available to defense counsel does not render additional impeachment evidence immaterial." (Citing *Napue*, 360 U.S. at 270, 79 S.Ct. 1177, 3 L.Ed.2d at p. 1221 (1959)); *United States v. Lloyd*, 71 F.3d 408, 411 (D.C. Cir. 1995). Evidence is material if, "the undisclosed information could have substantially affected the efforts of defense counsel to impeach the witness, thereby calling into question the fairness of the ultimate verdict." *Id.* at 515; *United States v. Smith*, 77 F.3d 511, 515 (D.C. Cir. 1996). "Therefore, our focus is on the potential impact that the undisclosed evidence might have had on the fairness of the proceedings rather than on the overall strength of the government's case."

*Also see, United States v. Bigeleisen*, 625 F.2d 203, 208 (8th Cir. 1980) ("misleading argument"); *United States v. Barham*, 595 F.2d 231, 243 n.17 (5th Cir. 1979) ("misleading" answers reinforced by prosecutor); *United States v.*

*McClintic*, 570 F.2d 685, 692 (8th Cir. 1978) (failure of government to correct "misleading impression" regarding witness' pending charges); *United States v. Anderson*, 574 F.2d 1347, 1355 (5th Cir. 1978) (prosecutor allowed "jury to be presented with a materially false impression"); *United States v. Butler*, 567 F.2d 885, 891 (9th Cir. 1978) (witness paraded himself in "false colors"); *Boone v. Paderick*, 541 F.2d 447, 450 (4th Cir. 1976), *cert. denied*, 430 U.S. 959, 97 S.Ct. 1610, 51 L.Ed.2d 811 (1977) (testimony which "skirts the edge of perjury").

Specifically, this Court rejected the Sixth Circuit's *likely* reasoning in *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995), (quoting *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383 (opinion of Blackmun, J.)), this Court elaborated on the meaning of materiality under *Bagley*, stressing that a reviewing court must focus on the fairness of the trial the defendant actually received rather than on whether a different result would have occurred had the undisclosed evidence been revealed:

> [A] showing of materiality does not require demonstrating a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is *not* whether the defendant would more *likely* than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

*Id.* at ___, 115 S.Ct. at 1566 (quoting *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381) (citations omitted).

Mitchell was the centerpiece of the government's case, *i.e.*, the government had to convince the jury that Robinson knew the backhoes were stolen. The government brought this fact to the attention of the jury in its closing argument:

> "The only person that testified with knowledge that Mr. Robinson had some intimate knowledge of Case backhoes happens to be Eddie Mitchell, and, of course, Mr. Robinson doesn't like Eddie Mitchell testifying against him, and I don't like having to use someone like Eddie Mitchell, but Eddie Mitchell is a person that has that kind of knowledge. (Colloquy Closing Arg. at p. 47).

The Government's questions and closing argument, coupled with Mitchell's answers, undoubtedly misled the jury about Mitchell's pending State charges. The jury was led to believe that no agreements whatsoever had been struck and that Mitchell was facing the State charges on his own which could result in 25 years imprisonment. Prosecutors used this fact to neutralize defense counsel's attacks on Mitchell's credibility – since there were no agreements, he had nothing to gain.

Had the jury been apprised of the true facts, there is a reasonable probability that they would have concluded that Mitchell had fabricated testimony in order to curry the favor of the very representative of the government who was prosecuting the case in which Mitchell was testifying, for Mitchell believed that such representative was in a position to implement (as he ultimately did) any promise of consideration. AUSA Schwartz himself thought it important to establish before the jury that *no* promise of consideration had been given Mitchell in return for his testimony against Robinson is made clear by his direct examination:

> *AUSA SCHWARTZ:* So you're now facing those with no promise whatsoever as to the outcome?
>
> *MITCHELL:* No, sir.

*AUSA SCHWARTZ:* And that's a serious charge that you're facing? (Mitchell Tr., Vol. 7 at p. 25).

*MITCHELL:* Yes it is. (*Id.* at p. 26).

The same was made clear by AUSA Schwartz' redirect examination of Mitchell:

*AUSA SCHWARTZ:* Now have I told you anything about your State charges – or tell me what I have told you about your State charges?

*MITCHELL:* You ain't told me nothing.

*AUSA SCHWARTZ:* Huh?

*MITCHELL:* You ain't told me nothing about the state charges.

*AUSA SCHWARTZ:* You're charged, and that's your problem?

*MITCHELL:* Yes, it is. (*Id.* at p. 62). (Emphasis supplied).

Furthermore, had it been brought to the attention of the jury that Mitchell was lying after he had purportedly undergone a moral transformation and decided to change his ways, his entire testimony may have been rejected by the jury. It was one thing for the jury to learn that Mitchell had a history of improprieties; it would have been an entirely different matter for them to learn that after having taken an oath to speak the truth – he made a conscious decision to lie. *See United States v. Wallach*, 935 F.2d 445, 457 (2nd Cir. 1991) (Same).

The Government's use of Mitchell as an independent nature witness with personal knowledge of Robinson's alleged illegal alterations of 580-K backhoes, whose purported reason for testifying was to pay his debt of society and put his life in order, created a false impression that it is a "reasonable probability" would have affected the jury's view of Mitchell's testimony and, if so would undermine confidence in the outcome of Robinson's trial.

1. Why would the government agree to assist Mitchell with his States charges which he had been convicted

of many times prior [facing 25 years imprisonment and the State had made a strong case against him] in return for his uncoordinated testimony [which he had never been arrested, charged, tried, or convicted of before] against Robinson?

2. Why would the government not agree to help Mitchell with his second State indictment, before Robinson's conviction when he was doing everything they had hoped he would do, but only agree to help him after Robinson's conviction and after he had tested positive for illegal drugs seven (7) times; had been a fugitive for 60 days plus; and while he was a fugitive, had been in Nashville, Tennessee breaking into vending machines which was the same crimes he had been convicted of many times prior, and the same types of crimes contained in the State's second indictment which had been pending 10 months prior to the Nashville crimes?

The holdings of the Court of Appeals in the present case, not only conflict with this Court's holding and other Courts of Appeals throughout the Federal Circuits, there is a conflict between the Judges within the Sixth Circuit Court of Appeals on this important issue. *See United States v. Schledwitz*, 86 F.3d 73 (6th Cir. 1996) dissenting opinion Merritt, C.J., joined by Martin, J.:

> "The Court is too deferential to the government and not sufficiently concerned about protecting the rights of the accused. If this *Brady* violation is immaterial and does not make any difference, when will such a violation make a difference? The panel decision unfortunately sends a message to prosecutors that they can engage in serious ethical and constitutional lapses in violation of *Brady* and *Kyles* with impunity. We should not permit that message to go out . . . " *Id.* at p. 76.

Because this issue is recurring and important, the Court should grant review.

**CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE STANDARD LAID DOWN IN *UNITED STATES V. OLANA*, 507 U.S. 725, 123 L.ED.2d 508, 113 S.CT. 1770 (1993), AND CODIFIED IN FEDERAL RULES OF CRIMINAL PROCEDURE 52 (b), WAS CORRECTLY APPLIED BY THE COURT OF APPEALS.**

The decision of the Court of Appeals contravenes holding by this Court that the Due Process and Jury Trial Clauses of the Fifth and Sixth Amendments entitled a criminal defendant to a jury verdict on each element of the charged offense. *United States v. Gaudin*, 515 U.S. 506, 132 L.Ed.2d 444, 449, 458 (1985); *Sullivan v. Louisiana*, 508 U.S. 275, ___, 113 S.Ct. 2078, ___, 124 L.Ed.2d 182, 188 (1993); *In Re Winship*, 397 U.S. 358, 364 (1970).

The interstate transportation of stolen motor vehicles counts charged in Robinson's indictment also served as the specified unlawful activity predicate of Robinson's money laundering convictions. Those charges therefore had an enormous significance in Robinson's case because without convictions on the underlying 18 U.S.C. § 2312 charges, all of the felony charges in the indictment would fail. It was therefore essential, that the Trial Court correctly instruct the jury about those counts.

At the close of Robinson's trial (at the Government's behest), the District Court instructed the jury, in pertinent parts, as follows:

(A) "Term 'motor vehicle' includes any self-propelled vehicle designed for running on land but not on rails. *A backhoe (is) a motor vehicle as that term is used in these instructions.*" (Emphasis supplied). (Instruction R:148 at p. 8)

(B) " . . . but only to prove the defendant's state of mind; that is, that the defendant acted as charged in this case with knowledge that the *backhoes* were stolen and not through accident or mistake." (*Id.* at p. 15).

(C) " . . . If you are convinced that the defendant deliberately ignored a high probability

that *the backhoes* were stolen, then you may find that he knew that they were stolen." (*Id.* at p. 17).

(D) "But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that *the backhoes* were stolen,. . . . "[9] (*Id.*)

Robinson did not object to the Trial Court's constitutionally defective jury instructions; nevertheless, he did not concede or stipulate, that the backhoes were motor vehicles. Nor did he invite them.

On appeal, Robinson argued: (1) the trial court's instructions prevented the jury from considering a material issue, which was equivalent to a directed verdict on the issue, in violation of his Fifth Amendment right to due process, and Sixth Amendment right to a jury trial; (2) the government failed to introduce sufficient evidence that *the backhoes* were "motor vehicles" as defined by 18 U.S.C. § 2311, *i.e.*, the government never introduced *the backhoes* into evidence; the government never introduced photographs of *the backhoes* into evidence; there was no witness testimony that *the backhoes* had the characteristics that brought them within the statutory definition of a motor vehicle.

Because Robinson's counsel failed to object to the District Court's deciding that a backhoe is a motor vehicle and stating the backhoes in other instructions, the Court of Appeals for the Sixth Circuit, reviewed for plain error. Applying the plain error analysis based on its holdings in *United States v. Jones*, 108 F.3d 668, 670 (6th Cir. 1997) (en banc),[10] the Court of Appeals held:

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[9] The District Court gave a printed copy of these jury instructions to the jury to refer to during their deliberations.

[10] There are important differences between *Jones* and the present case. *Jones* involved a stipulated fact, the present case does not. *Jones*, 108 at 670.

> "An instruction is not plainly erroneous unless there was an egregious error, one that directly led to a miscarriage of justice. Assuming without deciding that the district court's instruction was erroneous, it nevertheless does not require reversal since a rational jury would have concluded that a backhoe fell within the definition of a motor vehicle." *See Robinson,* Slip op. at p. 3, 4 (App. A).

Robinson believes such a cursory dismissal of his Due Process and jury trial rights is error.

The Court of Appeals erred by engaging in fact-finding and substituted their speculation of what a jury may have found, not what it did find.

This Court has held:

> "The Sixth Amendment requires more than appellant speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty."
> *See Sullivan, supra,* at 508 U.S. 280, 124 L.Ed.2d 190, 113 S.Ct. 2078 (1993) (quoting *Bollenbach v. United States,* 226 U.S. 607, 614, 90 L.Ed. 350, 66 S.Ct. 402 (1946).

Title 18, United States Code, Section 2312, provides as follows:

> Whoever transports in interstate or foreign commerce motor a vehicle or aircraft, knowing the same to have been stolen, shall be fined under this title or imprisoned not more than 10 years, or both.

Clearly the statute's concern is with a motor vehicle or aircraft. There is no indication the statute's reach includes or embraces a backhoe in general.

Subsection Title 18, United States Code, Section 2311, defines "motor vehicle" for purpose of the statute as follows:

> Motor vehicle includes an automobile, automobile truck, automobile wagon, motorcycle, or

any other vehicle designed for running on land *but not on rails.*

The statute's definition of a motor vehicle does not include a backhoe in general.

Robinson believes the Court of Appeals did not make the connection between the difference of a *backhoe* and *the backhoes.* (Whether a backhoe may fall within the definition of a motor vehicle is not the issue). The issue is the backhoes as that term was used in the District Court's instructions, which were given in reference to the law to be applied to the charges contained in the indictment, were what the government was supposed to be required to prove beyond the *jury's* reasonable doubt, had the characteristics that brought them within the statutory definition of a motor vehicle. The problem is J.I. Case Loader backhoes, as stated in the indictment, have at least two (2) different design characteristics; one is designed to run on land, the other is designed to run on rails. The point however, is what were the design characteristics of *the backhoes*? This is a factual question, and the Sixth Amendment and the Due Process Clause requires that it be put to the jury to determine this factual issue beyond a reasonable doubt. *See United States v. Gaudin*, 28 F.3d 943, 951 (9th Cir. 1994). However, when the District Court (at the government's behest) instructed the jury that *a backhoe is* a motor vehicle as that term is used in instructions, the District Court thereby (at the government's behest) withdrew the element of motor vehicle from the jury, which deprived the jury of its fact-finding duty, and violated Robinson's Due Process and Sixth Amendment rights. This Court has held these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 124 L.Ed.2d 182, 188, 113 S.Ct. 2078, 2080-2081 (1993); *In Re Winship*, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970), "A

necessary corollary is the right to have one's guilt determined only upon proof beyond the *jury's* reasonable doubt of every fact necessary to constitute the crime charged." *Cool v. United States*, 409 U.S. 100, 104, 34 L.Ed.2d 335, 93 S.Ct. 354 (1972) (per curiam); *Mullaney v. Wilbur*, 421 U.S. 684, 685, 44 L.Ed. 2d 508, 511, 95 S.Ct. 1181, 1183 (1975); *Patterson v. New York*, 432 U.S. 197, 210, 53 L.Ed.2d 281, 292, 97 S.Ct. 2319 (1977), State must prove "all of the elements included in the definition of the offense" beyond a reasonable doubt; *United States v. Gaudin*, 515 U.S. 506, 132 L.Ed.2d 444, 115 S.Ct. 2310, 2320 (1995), "The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."

The District Court's erroneous, factual assertion which was invited by the government, provided what the record lacked, "evidence" that the backhoes had the design characteristics that brought them within the statutory definition of a motor vehicle.

Robinson's counsel did not object at trial to the instructions given by the District Court. Therefore, review is for plain error under Fed.R.Crim.P. 52(b) as set forth in *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). According to *Olano*, plain error review requires: 1) error; 2) plain under current law; 3) that affects substantial rights, *i.e.*, is prejudicial to the defendant; and, 4) which seriously affects the fairness, integrity or public reputation of judicial proceedings.

Applying *Sullivan, supra*, as the law at the time of Robinson's trial, it was error, that was plain, for the District Court rather than the jury to reach the requisite finding of guilty; and thus, Robinson's beliefs meet the first two tests of *Olano*. Robinson believes by the District Court taking a required element of the crime away from the jury was an error that affects substantial rights and one that seriously affects the fairness, integrity or public reputation of judicial proceedings, as required by *Olano*,

since Due Process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime charge." *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970). Robinson therefore believes that the District Court's deciding an essential element of the crime was prejudicial to him here, because the jury could not have been expected to make a finding beyond a reasonable doubt as to the design characteristics of the backhoes, in the face of an instruction to the contrary.

The holdings of the Sixth Circuit Court of Appeals in the present case, conflicts with the holdings of other Court of Appeals throughout the Federal Circuit on this important Constitutional issue. Where a defendant has been denied his Fifth Amendment right to Due Process of Law and his Sixth Amendment right to a jury determination of an important element of the crime, the integrity of the judicial proceeding is jeopardized. *Gaudin*, 28 F.2d at 952; *United States v. Retos*, 25 F.3d 1220, 1232 (3rd Cir. 1994) (same); *United States v. Jones*, 21 F.3d 165, 173 (7th Cir. 1994); *also see, United States v. Baumgardner*, 85 F.3d 1305, 1310 (8th Cir. 1996) (reversing conviction on plain error review where "the evidence of materiality was slim"); *United States v. David*, 83 F.3d 638, 647-48 (4th Cir. 1996) (reversing conviction because among other considerations, "a jury could conceivably have concluded . . . that materiality was not ultimately proven"). In the present case, a jury could conceivably have concluded that the design characteristics of the backhoe was not ultimately proven.

The constitutional right to a jury trial in a criminal case is a profound and fundamental prohibition against judges making determinations of guilt. *Duncan v. Louisiana*, 391 U.S. 145, 155-156 (1968).

The Government's case against Robinson was an extremely weak one. At the end of the government's case, the District Court threw out seven of the eighty-two counts for lack of evidence. At the end of two days of

deliberations, the jury informed the District Court that they had a split vote as to conviction, or acquittal. After further deliberations, the jury returned a verdict of guilty as to nine counts of interstate transportation; nine counts of the attached money laundering charges; three misdemeanors, and not guilty as to the other fifty-four counts. Absent the District Court's erroneous jury instructions, which were invited by the government, the record is lacking of evidence that the backhoes had the design characteristics that brought them within the statutory definition of a motor vehicle. Absent Mitchell's testimony, the record is lacking of evidence that Robinson knew the backhoes were stolen.

The holdings of the Court of Appeals suggests, in effect, that all convictions based on these Constitutional violations must be affirmed. This is a substantive point; and it tends to diminish the force of the Fifth and Sixth Amendments to the Constitution of the United States.

This Court should settle the important issues presented, and the Circuits are in direct conflict as to the important question of the proper application of Fed.R.Cr.P. 52(b), as well as the appropriate constitutional standard of materiality governing motions for new trial, based on the prosecution's knowing use of perjured testimony, under circumstance(s) presented.

## CONCLUSION

This Court should bear in mind that the ruling in the Court of Appeals for the Sixth Circuit is so succinct that it is difficult for a pro se litigant to discern the facts of the case or the reasons for the judges' ruling.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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## APPENDIX – A

## NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

**Nos. 95-6668; 97-5685**

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, **Plaintiff-Appellee,** | ) | ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY |
| v. | ) | |
| JOHN A. ROBINSON **Defendant-Appellant.** | ) | **OPINION** |
| | ) | (Filed Sep. 11, 1998) |

**BEFORE: KENNEDY, GUY, and NORRIS, Circuit Judges.**

**ALAN E. NORRIS, Circuit Judge.**

I.

Between 1990 and 1994, defendant John Robinson operated a business called John Robinson Equipment Brokers through which he sold at least thirty-three backhoes to a Canadian exporting company. He sold these backhoes both directly and through a shipping company in South Carolina. At some point, the shipping company discovered irregularities concerning the provenance backhoes. Although defendant maintained that he had no knowledge that the backhoes were stolen, a jury found him guilty of numerous crimes: interstate transportation of stolen vehicles, 18 U.S.C. § 2312; failure to file tax

returns, 26 U.S.C. § 7203; and money laundering, 18 U.S.C. § 1956(a)(1)(B)(i) & 1957(b)(1). Defendant appeals his conviction on several grounds: (1) the district court improperly denied him a continuance; (2) the court gave an improper instruction to the jury; (3) there was insufficient evidence to support the money laundering convictions; (4) the government violated the Equal Protection Clause in selecting the jury; and (5) the district court improperly allowed the government to introduce evidence of similar crimes pursuant to Fed. R. Evid. 404(b). He also appeals the district court's refusal to vacate his conviction or grant him a new trial based upon his contention that a government witness testified falsely at trial.

## II.

### A.

This case involves three indictments: the original indictment of October 19, 1994; the first superseding indictment of April 19, 1995; and the second superseding indictment of May 1, 1995. On May 8, 1995, defendant moved to continue the trial from its scheduled start date of May 15 on the grounds that the superseding indictments made it impossible for him to prepare for trial properly. The district court denied his motion. Defendant argues that the denial violated his Sixth Amendment right to counsel.

"We review the district court's denial of a motion for a continuance for an abuse of discretion." *United States v. King*, 127 F.3d 483, 486 (6th Cir. 1997) (citations omitted), *cert. denied*, 118 S. Ct. 1082 (1998). "To demonstrate reversible error, the defendant must show that the denial

resulted in actual prejudice to his defense," *Id.* at 487 (quotation and citation omitted), that is, he must show "that a continuance would have made relevant witnesses available or added something to the defense." *Id.* (citation omitted). The district court noted that defendant had not demonstrated with any specificity how his pretrial preparation was prejudiced. On appeal, he contends that if given more time he would have been able "to put on complete proof, through witnesses and evidence, that he bought the backhoes . . . without knowledge that they were stolen." However, defendant gives no indication of what witnesses or evidence he would have produced given more time. The district court pointed out that the government's theory of its case had never changed, and that the additional documents produced by the government were copies of defendant's own invoices and shipping records for the backhoes. Under these circumstances, we are unable to say the district court abused its discretion in denying the continuance.

B.

With respect to the charges against defendant for the interstate transportation of a motor vehicle,[1] the district court instructed the jury as follows: "The term 'motor vehicle' includes any self-propelled vehicle designed for running on land but not on rails. A backhoe is a motor

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[1] "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined under this title or imprisoned not more than 10 years, or both." 18 U.S.C. § 2312.

vehicle as that term is used in these instructions." Defendant argues that this instruction amounts to reversible error because it removed from the jury the obligation to find proof of an element of a crime beyond a reasonable doubt. *See United States v. Gaudin*, 28 F.3d 943, 951 (9th Cir. 1994).

Because defendant failed to object to this instruction at trial, we review for plain error. *United States v. Jones*, 108 F.3d 668, 670 (6th Cir. 1997) (enbanc). An instruction is not plainly erroneous unless there was an egregious error, one that directly led to a miscarriage of justice. *See id.* at 673. Assuming without deciding that the district court's instruction was erroneous, it nevertheless does not require reversal since a rational jury would have concluded that a backhoe fell within the definition of a motor vehicle.

C.

Defendant argues that the government failed to produce sufficient evidence to support his conviction for money laundering in violation of § 1956(a)(1)(B)(i). The relevant question for us to determine is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . We draw all available inferences and resolve all issues of credibility in favor of the jury's verdict. . . . " *United States v. Avery*, 128 F.3d 966, 971 (6th Cir. 1997) (citations omitted). The elements of § 1956(a)(1)(B)(i) money laundering are: "(1) use of funds that are proceeds of unlawful activity; (2) knowledge that the funds are

proceeds of unlawful activity; and (3) conduct or attempt to conduct a financial transaction, knowing that the transaction is designed in whole or in part to disguise the nature, location, source, ownership, or control of the proceeds." *United States v. Moss*, 9 F.3d 543, 551 (6th Cir. 1993).

Defendant argues that the fact that he conducted all the relevant transactions in his own name and deposited all the proceeds in an account bearing his name demonstrates that he was not trying to conceal the transactions. After reviewing the record, we find that the jury had sufficient evidence before it to find that defendant attempted to conceal the illegal source of the money.

D.

Defendant next contends that the government violated the Equal Protection Clause during voir dire by using preemptory challenges to strike jurors on the basis of race. *See Batson v. Kentucky*, 476 U.S. 79 (1986). To succeed with such a claim,

> a defendant must first establish a prima facie case showing that the prosecution exercised peremptory strikes on the basis of race. If the defendant satisfies this requirement, the prosecution must articulate a race-neutral explanation for the challenges. The trial court must then decide if the defendant has carried the burden of proving purposeful discrimination.

*United States v. Tucker*, 90 F.3d 1135, 1142 (6th Cir. 1996) (citing *Batson*).

During voir dire, the government used three of its eight peremptory challenges to strike blacks: R.M., D.D., and D.W. In chambers, prior to the start of trial, defendant asked for the government to explain on the record its reasons for striking these three jurors. The government gave the following explanations. R.M. was struck because she had been a hold-out juror in a previous trial. D.D. was struck because of his long commute, car problems, reluctance to serve, residence in an area of the state in which the people tend not to favor the prosecution, young age, the fact he wore a ponytail, and the fact that he had only a ninth grade education. D.W. was struck because she appeared to smile and wink at defendant. Defendant accepted the explanation regarding R.M., but made a *Batson* challenge with respect to D.D. and D.W. The district court rejected defendant's challenge, stating, "I think that the government has articulated race-neutral reasons for striking these jurors, and I am of the opinion that the reasons articulated are valid."

Normally, a defendant must make a prima facie showing that the prosecution considered race in using its peremptory challenges. *Tucker*, 90 F.3d at 1142. Once the trial court has heard and ruled on a prosecutor's articulated reason, however, the issue of whether the defendant made a sufficient prima facie showing becomes moot. *Id.* (citation omitted). Thus, the issue for our review is whether defendant established by a preponderance of the evidence that the peremptory strikes were intentionally discriminatory. *Id.* (citation omitted). The district court's factual findings on this issue are reviewed for clear error. *Id.* (citation omitted). Although defendant argues that the government's explanations are a cover for race-based

considerations, we cannot say that the district court's determination to the contrary is clearly erroneous. The fact that the government declined the opportunity to strike two other black jurors "militates against a finding that discrimination motivated the strikes." *Id.* (citation omitted). Further, defendant has failed to demonstrate "that the articulated reasons were in fact a pretext by showing, for example, that the prosecution had not challenged equally unintelligent or disinterested jurors of other races." *Id.*

E.

During trial, the district court permitted the government to introduce the testimony of three witnesses pursuant to Federal Rule of Evidence 404(b).[2] The testimony of these witnesses established that in 1985 defendant possessed a stolen and altered bulldozer, and that he had altered a backhoe in 1994. The government argued that this testimony was offered to show that he had the knowledge to identify an altered backhoe and thus was not credible in his contention that he did not know the backhoes were stolen.

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[2] The Rule provides that,

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

Fed. R. Evid. 404(b).

We have previously stated our approach when reviewing a trial court's decision to admit evidence pursuant to Rule 404(b):

> The court engages in a three-step analysis when reviewing the admission of evidence under Rule 404(b). First, we review the district court's determination that sufficient evidence supports the occurrence of the other acts for clear error. We then review *de nova* whether the district court correctly determined that the evidence was admitted for a legitimate purpose. Finally, we review for an abuse of discretion the district court's determination that the "other acts" evidence is more probative than prejudicial under Rule 403.

*Tschira v. Willingham*, 135 F.3d 1077, 1086 (6th Cir. 1998) (internal quotation and citations omitted).

The district court first established that defendant had been convicted for the acts to which the testimony related. Next, it concluded that the evidence was admitted for a legitimate purpose, to "help prove that the defendant knew that the particular backhoes in issue in this case were stolen because if he knew how to alter them, then the alterations would be more apparent to him." Finally, the district court determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. We agreed with the district court's determination that admission of the evidence was proper.

F.

Defendant's appeal from the denial of his motion to vacate his conviction or grant him a new trial is based upon his contention that the government knowingly used perjured testimony to obtain his conviction. One of the government's witnesses testified pursuant to a plea agreement. During his testimony, the witness admitted that he could get a more favorable federal sentence for cooperating with the government. Defendant, however, argues that the witness' plea agreement also served to benefit him with regard to Kentucky state charges. The witness did not testify as to this and the government contends that there was no such deal. Nevertheless, a federal government official did appear at the witness' state court sentencing hearing to ask for leniency on his behalf. The district court conducted a hearing on the matter and found that there was no deal regarding the state court charges, and that the witness therefore did not testify falsely. Generally, we review specific findings of fact, such as the one made here by the district court, for clear error. *See United States v. Charles*, 138 F.3d 257, 262 (6th Cir. 1998). But we review for abuse of discretion the district court's denial of a new trial based upon a defendant's allegation of perjured testimony. *United States v. Pierce*, 62 F.3d 818, 833 (6th Cir. 1995).

"The knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable likelihood that the false testimony cold have affected the judgment of the jury." *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989). To establish such a violation, defendant "must show (1) the statement was actually

false; (2) the statement was material; and (3) the prosecution knew that it was false." *Id.* The district court's finding that the witness did not testify falsely is not clearly erroneous. Moreover, even if the witness did testify falsely, the falsehood was not material. The jury was aware that the witness stood to gain by testifying against defendant. It is unlikely that the jury would have found the witness to be any less credible because he stood to benefit with respect to both federal and state charges rather than just the federal charges.

III.

Accordingly, we **affirm** defendant's convictions and the order of the district court denying defendant's motion to vacate his conviction or to grant him a new trial.

**APPENDIX - B**

Case No: 95-6668: 97-5685

**UNITED STATES COURT OF APPEALS**

**FOR THE SIXTH CIRCUIT**

**ORDER**

UNITED STATES OF AMERICA

Plaintiff - Appellee

v. (Filed Nov. 3, 1998)

JOHN A. ROBINSON

Defendant - Appellant

BEFORE: KENNEDY, GUY, and NORRIS, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

**ENTERED BY ORDER OF THE COURT**

/s/ Leonard Green
Leonard Green, Clerk

## APPENDIX – C

### FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENCE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW, NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.

### FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN

HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENCE.

**SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

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